

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs May 11, 2005 Session

**STEVEN B. SOEST v. JILL M. (MASON) SOEST**

**Appeal from the General Sessions Court for Roane County  
No. 6288A     Dennis W. Humphrey, Judge**

**Filed June 27, 2005**

**No. E2004-00957-COA-R3-CV**

This appeal involves the equitable division of the parties' marital assets, including the Tier II railroad retirement benefits of Steven B. Soest ("Husband"). When Jill M. (Mason) Soest ("Wife") and Husband were divorced, the Trial Court stated its intent to divide Husband's "retirement benefits" as equally as possible. Under federal law, Husband's Tier I retirement benefits are not subject to division in divorce proceedings, but Tier II benefits have no such restriction. The Trial Court entered an Order awarding Wife 100 % of Husband's Tier II benefits, and Husband appeals. We vacate the judgment of the Trial Court and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the  
General Sessions Court Vacated; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which SHARON G. LEE, J., and WILLIAM H. INMAN, SR. J., joined.

Tom McFarland, Kingston, Tennessee, for the Appellant Steven B. Soest.

Lance A. Evans, Maryville, Tennessee, for the Appellee Jill M. (Mason) Soest.

## **OPINION**

### **Background**

This is a divorce case with the primary issue on appeal centering around the property division and, in particular, the manner in which the Trial Court divided Husband's federal railroad retirement benefits. The parties were married in January of 1978 and separated over twenty-three years later. Husband is 48 years old, and Wife is 47. In August of 2001, Husband filed a complaint for divorce on the ground of irreconcilable differences. Wife answered the complaint and filed a counter-complaint for divorce alleging that Husband was guilty of adultery and inappropriate marital conduct. Wife admitted that irreconcilable differences had arisen between the parties.

In February of 2003, the Trial Court entered a Final Judgment of Divorce granting Wife a divorce based on Husband's admitted inappropriate marital conduct. As relevant to this appeal, the judgment provided that:

Wife shall receive [one-]half of Husband's United States Railroad Retirement and shall be permitted to file a Qualified Domestic Relations Order (QDRO) with this Court and with the United States Railroad Retirement Board to secure her share of the retirement benefits for the years that the parties were married while Husband was employed by the railroad.

The Trial Court later set aside its initial Final Judgment and after an additional hearing was conducted, a new Final Judgment of Divorce was entered on May 20, 2003. The second Final Judgment, however, contained the identical language as the initial Final Judgment with respect to the division of Husband's railroad retirement benefits. On the same day the second Final Judgment of Divorce was entered, the Trial Court entered a Qualified Domestic Relations Order ("QDRO") which was titled Order Dividing Railroad Retirement Benefits. The QDRO stated:

[Wife] is awarded, and the Railroad Retirement Board is directed to pay, an interest in the portion of [Husband's] benefits under the Railroad Retirement Act (45 U.S.C. § 231, et seq.) which may be divided as provided by Section 14 of that Act (45 U.S.C. § 231 m). [Wife's] share shall be computed by multiplying the divisible portion of [Husband's] monthly benefit by a fraction, the numerator of which is the number of years [Husband] worked for a railroad employer during the period of the marriage, January 1978 through, September, 2002, and the denominator of which shall be [Husband's] total number of years employed by a railroad employer at retirement, and then dividing the product by one. [Wife] shall receive all of Tier II benefits.

Husband filed a motion to set aside the QDRO and after further hearings and argument, a new Order Dividing Railroad Retirement Benefits was entered on March 25, 2004. This order, however, contains the exact same language quoted above from the May 20, 2003 QDRO. On the same day the March 25, 2004 QDRO was entered, yet another hearing was conducted regarding the division of Husband's retirement benefits. Following this hearing, the Trial Court entered an order on April 1, 2004 stating, among other things, that:

The Court further ruled that the railroad retirement benefits would be divided between the parties as previously ordered (the Court stating, after considering the brief of counsel and legal arguments presented, that it was the Court's intention to lawfully divide the retirement benefit a[s] equally as possible due to the length of the marriage) ....

On April 15, 2004, the Trial Court entered its last and final Amended Order Dividing Railroad Retirement Benefits. According to this QDRO:

[Wife] is awarded, and the Railroad Retirement Board is directed to pay, an interest in the portion of [Husband's] benefits under the Railroad Retirement Act (45 U.S.C. § 231, et seq.) which may be divided as provided by Section 14 of that Act (45 U.S.C. § 231 m). [Wife] shall receive all of Tier II benefits. The parties expressly agree that this paragraph shall not apply to any disability annuity paid by the Railroad Retirement Board.<sup>1</sup>

Husband appeals, claiming the Trial Court erred when it awarded Wife all of his Tier II railroad retirement benefits.

### **Discussion**

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In *Beason v. Beason*, 120 S.W.3d 833 (Tenn. Ct. App. 2003), we set forth the following brief description of how the Railroad Retirement Act operates:

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<sup>1</sup> Husband currently is disabled. Because of Husband's disability, a provision was added to the April 15, 2004 order that Wife would not share in any of Husband's disability benefits earned through the railroad.

Retirement benefits for railroad employees are governed by federal statute. As a railroad employee the defendant, upon retirement, is entitled to benefits under the Railroad Retirement Act of 1974, (hereinafter the "Act") 45 U.S.C. § 231 *et seq.* The Act's scheme provides for two tiers of benefits which resemble both a private pension program and a social welfare plan. Tier I benefits are equivalent to those the employee would receive if covered by the Social Security Act, 42 U.S.C. § 401 *et seq.* See 45 U.S.C. § 231a(a)(1) and § 231b(a)(1). Tier II benefits are supplemental annuities which, like a private pension plan, are tied to earnings and career service. See 45 U.S.C. § 231a(b) and § 231b(e).

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In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S. Ct. 802, 59 L. Ed. 2d 1 (1979) the United States Supreme Court considered whether an award of railroad retirement benefits to a spouse when dividing marital assets upon divorce was prohibited by the Act. The United States Supreme Court held that 45 U.S.C. § 231m specifically prohibited the division of benefits payable under the Act as property in a divorce. However, in 1983, Congress provided an amendment to § 231m which expressly permits characterization of Tier II benefits as property subject to distribution upon divorce. See 45 U.S.C. § 231m(b)(2). Notwithstanding the 1983 amendment, the holding in *Hisquierdo* is still controlling with respect to Tier I benefits.

*Beason*, 120 S.W.3d at 835 (quoting *Norton v. Norton*, No. 02A01-9609-CV-00222, 1997 Tenn. App. LEXIS 666, at \*\* 8-10 (Tenn. Ct. App. Oct. 1, 1997), *appeal granted and case remanded*). As in *Beason*, the present case involves only the equitable distribution of Husband's Tier II benefits inasmuch as the parties agree that Tier I benefits under federal law are not subject to division and distribution.

Tenn. Code Ann. § 36-4-121(c) requires a trial court to consider all relevant factors when making an equitable distribution of marital property, including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;

- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

A trial court has wide discretion in dividing the parties' marital property. *Barnhill v. Barnhill*, 826 S.W.2d 443, 449 (Tenn. Ct. App. 1991). As noted by this Court in *King v. King*, when dividing marital property:

The trial court's goal in every divorce case is to divide the parties' marital estate in a just and equitable manner. The division of the estate is not rendered inequitable simply because it is not mathematically equal, *Cohen v. Cohen*, 937 S.W.2d 823, 832 (Tenn. 1996); *Ellis v. Ellis*, 748 S.W.2d 424, 427 (Tenn. 1988), or because each party did not receive a share of every item of marital property. *Brown v. Brown*, 913 S.W.2d [163] at 168. . . . In the final analysis, the justness of a particular division of the marital property and

allocation of marital debt depends on its final results. *See Thompson v. Thompson*, 797 S.W.2d 599, 604 (Tenn. App. 1990).

*King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (quoting *Roseberry v. Roseberry*, No. 03A01-9706-CH-00237, 1998 Tenn. App. LEXIS 100, at \*11-12 (Tenn. Ct. App. Feb. 9, 1998), *no appl. perm. appeal filed*).

Husband's primary argument is that the Trial Court intended to award Wife one-half of his divisible railroad retirement pension. Because only Tier II benefits can be considered marital property, Husband argues that in order for the Trial Court to carry out its stated intentions, Wife should have been awarded only one-half of the overall benefits subject to division, i.e., one-half of his Tier II benefits. According to Husband, the final order entered by the Trial Court had the net effect of dividing both the Tier I and Tier II benefits almost equally, a result prohibited by federal law.

As set forth above, a division of marital property must be equitable, not equal. A division of marital property is not rendered inequitable simply "because each party did not receive a share of every item of marital property." *King*, 986 S.W.2d at 216. To be sure, if there was only one item of marital property, such as a marital residence, and one of the parties was awarded the entire interest in that property, then it is more likely that the property division would be inequitable when compared to a marital estate with numerous marital assets which are divided between the parties. However, as stated in *King* and similar cases, a spouse is not automatically entitled to a portion of any particular item of marital property so long as the overall distribution is equitable when considering the relevant factors set forth in Tenn. Code Ann. § 36-4-121(c). Therefore, we cannot conclude that the Trial Court erred as a matter of law solely by awarding Wife all of the Tier II benefits.

Husband asks this Court to award him one-half of the Tier II benefits which, Husband argues, would correct the final order so as to carry out the Trial Court's real intentions. When the first judgment was entered, the Trial Court did state that Husband's "retirement benefits" should be split evenly. In the order entered on April 1, 2004, the Trial Court once again reaffirmed its stated intent of dividing the railroad "retirement benefits" as "equally as possible." Husband argues that because the Trial Court legally cannot divide Tier I benefits, the only possible way to divide Husband's "retirement benefits" as "equally as possible" would be to split evenly the Tier II benefits. The final QDRO does not do that but instead awards Wife all of the Tier II benefits. Stated another way, Wife was awarded the entire portion of Husband's divisible pension which Husband claims is altogether inconsistent with the Trial Court's stated intent. Although somewhat strained, we cannot say that this argument has no merit.

Wife, however, argues that the Trial Court approved an agreement by the parties to the effect that each would benefit equally in the railroad retirement benefits because of the length of the marriage. Wife acknowledges that Husband's Tier I benefits cannot be divided, but argues that her being awarded all of the Tier II benefits resulted in Husband's overall pension being divided

as evenly as possible without running afoul of federal law.<sup>2</sup> Unfortunately, we have not been provided a transcript and, therefore, cannot ascertain if that was the stated intent. Based on the language of the final order entered by the Trial Court and the QDRO implementing its stated intent, Wife's argument is equally as plausible as Husband's, if not more so.

Rule 7 of the Rules of the Court of Appeals requires the appellant in a domestic relations case "where the issues involve the amount or the disposition of the marital property" to include in an appendix to his or her brief a tabulation of all marital property, its value, and how it was divided. The Rule further provides that if the appellee disagrees with the appellant's tabulation, "the appellee's brief shall contain a tabulation in the same form showing the appellee's version of the facts." Neither parties' brief contains this essential information. We note that the parties were able to agree on how to divide most of the marital property and debts, and we certainly encourage parties to reach such an agreement whenever possible. However, when there are remaining items for which the parties have been unable to agree on the proper manner of distribution, then a trial court is required to equitably divide the remaining disputed items in accordance with the factors listed in Tenn. Code Ann. § 36-4-121(c) with the goal being an equitable division of the marital estate.

Ordinarily this Court would affirm the judgment of a trial court where the appellant, in this case Husband, has not provided this Court with enough information in the record to convince us that the evidence preponderates against the trial court's judgment awarding the spouse, here Wife, all of the Tier II benefits as a part of the overall division of the marital estate. In this case, however, we believe it is appropriate to vacate the judgment insofar as it addresses the division of Husband's Tier II benefits and remand for further proceedings. We reach this conclusion primarily because of the ambiguity regarding whether the final QDRO implements the Trial Court's stated intent to divide Husband's "retirement benefits" as equally as possible. Specifically, what "retirement benefits" the Trial Court intended to divide as equally as possible is unclear. Also impacting this decision is the incomplete appellate record which effectively prevents us from determining whether the Trial Court properly considered all of the relevant factors contained in Tenn. Code Ann. § 36-4-121(c) when awarding Wife 100% of the Tier II benefits as a part of what must be an overall equitable marital property division. Finally, we note that Wife shares at least some responsibility in making sure the record on appeal is complete. *See* Rule 7 of the Rules of the Court of Appeals.

On remand, regardless of the result reached by the Trial Court, it should set forth which of the factors set forth in Tenn. Code Ann. § 36-4-121(c) impacted its decision. The Trial Court, with the assistance of counsel, should also set forth how all of the marital property was distributed and its value, and undertake a similar analysis for any marital debt and separate property of the parties. In the event of another appeal, counsel for the parties are instructed to comply with the Rules of the Court of Appeals and all other applicable rules.

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<sup>2</sup> According to a brief filed by Wife with the Trial Court, the value of the Tier I benefits at retirement would be \$1,731 per month, and the value of the Tier II benefits would be \$1,587. This is the only information in the record, slight as it is, on the value of Husband's Tier I and Tier II benefits.

### **Conclusion**

The judgment of the Trial Court is vacated, and this cause is remanded to the Trial Court for further proceedings as necessary consistent with this Opinion and for collection of the costs below. Costs on appeal are assessed one-half against the Appellant, Steven B. Soest, and his surety, and one-half against the Appellee, Jill M. (Mason) Soest.

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D. MICHAEL SWINEY, JUDGE